

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

JUN - 4 1996

DOCKET FILE COPY ORIGINAL

| | | |
|--------------------------------|---|---------------------|
| In the Matter of |) | |
| |) | |
| Implementation of Cable Act |) | CS Docket No. 96-85 |
| Reform Provisions of the |) | |
| Telecommunications Act of 1996 |) | |

COMMENTS OF TELE-COMMUNICATIONS, INC.

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036-3384

Its Attorneys

June 4, 1996

No. of Copies rec'd
List ABCDE

att

TABLE OF CONTENTS

| | PAGE NO. |
|--|----------|
| I. INTRODUCTION AND SUMMARY..... | 1 |
| II. EFFECTIVE COMPETITION TEST..... | 5 |
| A. The Act and the Legislative History Prohibit the Commission from Reading a Pass or Penetration Threshold, or a Requirement that the Cable Operator Demonstrate a Restraint on Rates, into the New Effective Competition Test. | 5 |
| B. "Comparable Programming" Definition..... | 10 |
| 1. A Telco-MMDS Operator's Marketing of a Programming Package that Includes Broadcast Signals Should Be Deemed <u>Conclusive</u> Evidence that the Operator is Offering Broadcast Signals, Regardless of the Technology Used to Receive Such Signals. | 10 |
| 2. Superstations are Included in Congress' Reference to "Television Broadcasting Signals." | 11 |
| C. LECs or LEC Affiliates Providing Video Programming "By Any Means" Includes the Provision of Such Programming Via a SMATV System. | 14 |
| III. MDU ISSUES..... | 17 |
| A. Predatory Pricing Issues..... | 17 |
| 1. TCI Supports the Use of Federal Antitrust Standards as Applied by Federal Courts in Reviewing Allegations of Predatory Pricing. | 17 |
| 2. The Commission Should Adopt a "Meeting Competition" Defense Under Section 623(d). | 19 |
| B. The Commission Should Establish a Uniform Definition of "Multiple Dwelling Units" for Purposes of Section 623(d) and the Expanded Private Cable Exemption. | 23 |
| IV. THE COMMISSION SHOULD REQUIRE THAT SUBSCRIBERS USE FCC FORM 329 IN FILING CPST COMPLAINTS WITH LFAS..... | 25 |

| | |
|--|----|
| V. TECHNICAL STANDARDS | 27 |
| A. The Amendments to Section 624(e) Create A Broad Prohibition On Any State or LFA Regulation of Cable Equipment or Transmission Technologies. | 27 |
| B. Any Power To Regulate Facilities or Equipment Previously Granted By Sections 621 or 626 of the Act is Preempted By the Amendment to Section 624(e). | 30 |
| CONCLUSION | 33 |

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

JUN - 4 1996

| | | |
|--------------------------------|---|---------------------|
| In the Matter of |) | |
| |) | |
| Implementation of Cable Act |) | CS Docket No. 96-85 |
| Reform Provisions of the |) | |
| Telecommunications Act of 1996 |) | |

COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI") hereby files its Comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.¹

I. INTRODUCTION AND SUMMARY

Congress adopted cable reform in the Telecommunications Act of 1996 ("1996 Act") for two primary reasons. First, it recognized that the "complicated and intrusive regulatory structure" created pursuant to the 1992 Act had "slowed development of new programming and dampened the industry's efforts to expand system capacity and introduce new

¹ In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Order and Notice of Proposed Rulemaking, CS Docket No. 96-85, FCC 96-154 (released April 9, 1996) ("Notice").

technology."² This was particularly troublesome because Congress, like the Administration and the Commission, realized the crucial need for a cable regulatory policy that would "promote the development of a broadband, two-way telecommunications infrastructure."

Second, Congress understood that video programming distribution had become significantly more competitive than it was in 1992 when the previous regulatory structure was created. In particular, Congress believed that telcos provided a unique and powerful competitive check on the video distribution business.⁴ As a result, it decided to deregulate cable operators and rely instead on "the development of marketplace forces to ensure that consumers have diverse and high quality entertainment and information choices at affordable rates."⁵

To the Commission's credit, it recognized "the deregulation intended by Congress" and moved quickly to adopt the "clear, self-effectuating revisions" to its rules required by the 1996 Act.⁶ TCI urges the Commission to continue its efforts to

² See H.R. Rep. No. 204, 104th Cong., 1st Sess. 54 (1995) ("House Report").

³ House Report at 107 (emphasis added). See also H.R. Conf. Rep. No 458, 104th Cong., 2d Sess. 1 (1996) ("Conference Report").

⁴ See House Report at 109.

⁵ Id. at 54.

⁶ Notice at ¶¶ 3-4.

achieve Congress' deregulatory goals by adhering strictly to the language of the statute as it addresses the remaining issues in the Notice.

Specifically, TCI recommends the following:

EFFECTIVE COMPETITION

- The new effective competition test is triggered by the presence of a telco in the cable operator's franchise area. Section 623(l)(1)(D) prohibits the Commission from reading into the new test a pass or penetration threshold or a requirement that the cable operator demonstrate a restraint on rates.
- A telco-MMDS operator's marketing of a programming package that includes broadcast signals should be deemed conclusive evidence that the operator is offering broadcast signals, regardless of the technology or combination of technologies used to receive such signals.
- The Commission must follow the plain language of the statute, as well as its own precedent holding that superstations constitute broadcast programming and, therefore, satisfy the comparable programming component of the new effective competition test.
- The new effective competition test is triggered by telco provision of video programming "by any means" (other than direct-to-home satellite services). That congressional test cannot be amended by the Commission to exclude SMATVs as a means of distributing video programming. Both the 1996 Act and the Commission's rules make clear that SMATV is not a direct-to-home satellite service.

UNIFORM RATES

- TCI agrees with the proposal in the Notice that the Commission use federal antitrust standards in analyzing predatory pricing under Section 623(d) of the Act. The federal antitrust standards are appropriate because they provide a national framework that will afford greater certainty than disparate local or state standards.

- In particular, the Commission should adopt the "meeting competition" standard of the federal antitrust rules. This standard would avoid needless controversies where the cable operator simply matches the price of a competitor, and thereby conserve valuable resources of the Commission, cable operators, and alternative MVPDs.
- The Commission should adopt the same definition of multiple dwelling unit ("MDU") for purposes of the uniform rate structure provision that it adopts for the private cable exemption under Section 602(7)(B) of the Act.

CPST RATE COMPLAINTS

- The Commission should require that subscribers use FCC Form 329 in filing CPST complaints with local franchising authorities ("LFAs"). Form 329 has been an important vehicle for identifying improper and invalid CPST complaints (e.g., complaints that in actuality address BST or premium programming rates).

TECHNICAL STANDARDS

- Section 624(e) creates a broad prohibition on any state or LFA regulation of cable equipment or transmission technologies. Congress adopted this prohibition in recognition of the fact that a patchwork of inconsistent local regulations would hinder technology development and the rapid deployment of a national, broadband telecommunications infrastructure.
- LFAs may not circumvent Congress' intent by attempting to regulate cable equipment and transmission technology through their general franchising or renewal authority.
- This does not mean the LFAs have no ability to require upgrades of cable systems. To the contrary, LFAs can require upgrades if such upgrades are necessary to meet future cable-related needs taking into account costs, and if there is a demonstrated demand for such upgrades. They are simply prohibited from dictating that such upgrades be completed using any particular equipment or transmission technology.

II. EFFECTIVE COMPETITION TEST

A. The Act and the Legislative History Prohibit the Commission from Reading a Pass or Penetration Threshold, or a Requirement that the Cable Operator Demonstrate a Restraint on Rates, into the New Effective Competition Test.

Section 301(b)(3) of the 1996 Act prohibits the Commission from reading into the new effective competition test a penetration or pass threshold or a requirement that a cable operator demonstrate that its rates are restrained when a telco enters the franchise area.⁷

Unlike the other three effective competition tests,⁸ the new test does not include a penetration or pass percentage of any kind. Nor does it require that cable operators demonstrate that the telco competition is at a "sufficient" level so as to have a restraining effect on cable rates. Rather, the unambiguous language of the Act finds effective competition present if a LEC-affiliated entity "offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable

⁷ See, e.g., Notice at ¶¶ 7, 17, 72.

⁸ See 47 U.S.C. § 543(1)(1)(A) (specifying a penetration test of below 30%); *id.* § 543(1)(1)(B) (specifying a pass test of 50% and a penetration test of 15%); *id.* § 543(1)(1)(C) (specifying a pass test of 50%).

operator."⁹ As Commissioner Chong has correctly noted, "Congress made its intention clear that this fourth effective competition test would be met if the LEC offered service in any portion of the franchise area."¹⁰

This interpretation is compelled by well-established Supreme Court precedent. The Supreme Court has held that "[where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion."¹¹ Had Congress wanted a minimum pass or penetration test in Section 301(b)(3), it would have inserted language to that effect, as it had in the case of the other three effective competition tests.

⁹ 47 U.S.C. § 543(1)(1)(D).

¹⁰ See Notice, Separate Statement of Commissioner Rachelle B. Chong, at 2 (emphasis in original).

¹¹ Gozlon-Peretz v. United States, 498 U.S. 395, 404 (1991) (finding that the omission of an effective date in one section of an Act, when effective dates were specifically inserted in other sections, evidenced clear intent that the section without a specified date become effective on the date of enactment) (citations omitted); Russello v. United States, 464 U.S. 16, 23 (1983) (finding a congressional failure to insert specific language into a section of the Act, where Congress had inserted such language in other sections, was conclusive evidence that Congress intended that the specifying language not be applied to that section).

The legislative history of Section 301(b)(3) confirms the statute's plain language. The Conference Report states that "effective competition exists when a telephone company ... is offering video programming services directly to subscribers by any means in the franchise area of an unaffiliated cable operator."¹² At no time did Congress propose, or otherwise indicate, that the fourth effective competition test required a minimum pass or penetration threshold, or any other Commission inquiry beyond the plain language of the provision. Indeed, the fact that the Conference Report is so specific in defining the key terms of the fourth effective competition test -- namely "offer" and "comparable programming" -- yet does not even suggest that a pass or penetration threshold would need to be defined, strongly supports the fact that Congress intended no such pass/penetration requirement.¹³

¹² Conference Report at 170. The House and Senate Reports also support this interpretation. See House Report at 109 ("[The Committee recognizes] that the provision of video programming services by a telephone company subjects a cable operator to effective competition that will ensure reasonable rates and high quality services much more effectively than government micromanagement."); S. Rep. No. 23, 104th Cong., 1st Sess. 40 (1995) ("Senate Report") ("[U]nder the bill, if a telephone company offers video services in a cable operator's franchise area, the cable operator's basic and expanded tiers of service will not be regulated.").

¹³ As Commissioner Quello points out, a no pass/no penetration reading of section 301(b)(3) is also supported by the "underpinnings of the 1996 Act, which eliminates rate regulation (continued . .)

In fact, the D.C. Circuit previously invalidated a similar attempt by the Commission to read a provision into the second effective competition test. In Time Warner Entertainment Co., L.P. v. F.C.C.,¹⁴ the Court struck down a Commission interpretation under which only MVPDs that passed at least 50% of households in a cable operator's franchise area were included in the determination of whether 15% of households in the franchise area subscribed to a competing video service.¹⁵ The Court reasoned that this Commission-imposed homes-passed requirement was in conflict "with the plain language of the statute,"¹⁶ noting that Congress did not "limit in any way the multichannel programming distributors to be considered," even though Congress

(... continued)

on the cable programming services tier in three years, and in many other respects minimizes the regulatory burden on cable operators." See Notice, Separate Statement of Commissioner James H. Quello at 1.

¹⁴ Time Warner Entertainment Co., L.P. v. F.C.C., 56 F.3d 151, 189 (DC Cir. 1995), cert. den. Time Warner Entertainment v. F.C.C., 116 S. Ct. 911 (1996) ("Time Warner Entertainment").

¹⁵ The Commission attempted to justify this reading of the Act by claiming it was necessary in order to "ensure that rate regulation can occur when there is 'cream skimming,' pursuant to which only select portions of a franchise area might receive a choice of several multichannel video programming distributors, while the remainder of the franchise area is left without such alternatives." Rate Order, 8 F.C.C.R. 5631, at ¶ 36 (1993).

¹⁶ Time Warner Entertainment, 56 F.3d at 189.

had done so in other parts of the effective competition definition.¹⁷ The Court also concluded that "had Congress intended to disqualify as overbuilds those systems" that failed to meet a minimum pass test, "it could have done so expressly."¹⁸ In short, the D.C. Circuit has already determined that the Commission must pay strict adherence to the statutory language when applying the effective competition tests. For the same reasons, any Commission attempt to read a pass or penetration threshold into the fourth effective competition test would be equally impermissible.

In the same decision, the D.C. Circuit overturned the Commission's holding that the uniform rate structure requirement of Section 623(d) should apply in all franchise areas "irrespective of the presence of 'effective competition' as defined in the Act."¹⁹ The Court found that the statute clearly prohibited rate regulation when a cable system met one of the statutory definitions of effective competition and that "[t]he Commission's arguments highlighting the problems with the choice made by Congress are insufficient to overcome this clear evidence

¹⁷ Id.

¹⁸ Id.

¹⁹ See Third Rate Reconsideration Order, 9 F.C.C.R. 4316, at ¶ 24 (1994).

of congressional intent."²⁰ Likewise, any potential problems the Commission could raise in an attempt to read a penetration/pass or other "rate-constraining" component into the fourth effective competition test is insufficient to overcome Congress' intent as evidenced by the plain language of section 301(b)(3).

B. "Comparable Programming" Definition

- 1. A Telco-MMDS Operator's Marketing of a Programming Package that Includes Broadcast Signals Should Be Deemed Conclusive Evidence that the Operator is Offering Broadcast Signals, Regardless of the Technology Used to Receive Such Signals.**

TCI agrees with the Notice's tentative conclusion that "[i]f the broadcast channels are available to the subscriber without an A/B switch or similar device, the MMDS operator will be deemed to be offering them within the meaning of Section 301(b)(3) of the 1996 Act."²¹ Moreover, while TCI agrees with the Notice's conclusion that "[i]nclusion of broadcast channels on the MMDS operator's rate card, advertising, or other marketing materials may be evidence that the MMDS operator offers the broadcast channels ... regardless of the technical means employed,"²² TCI believes the Notice does not go far enough. Given the fact that

²⁰ Time Warner Entertainment, 56 F.3d at 191.

²¹ Notice at ¶ 14.

²² Id.

an MMDS operator that markets itself as a provider of local broadcast channels will take the steps necessary to ensure that subscribers receive those channels,²³ such marketing efforts should represent conclusive evidence that that the MMDS operator offers broadcast channels.

TCI disagrees with the Commission's tentative conclusion that the MMDS operator will not be deemed to be offering broadcast channels "if the customer must install his or her own A/B switch to receive the broadcast channels."²⁴ Clearly, if the MMDS operator provides the A/B switch, it should be deemed to be offering the broadcast channels that the switch is specifically designed to make available. The notion that a cable operator's regulatory status depends on whether the telco-MMDS installer attaches an A/B switch to the back of the subscriber's television, or hands the switch to the subscriber to attach is illogical and would not serve any apparent public policy goal.

2. Superstations are Included in Congress' Reference to "Television Broadcasting Signals."

The plain language of the statute, as well as congressional and Commission precedent, make clear that consumer access to

²³ See id.

²⁴ Id.

superstations satisfies this component of the "comparable programming" definition.

As an initial matter, there is no evidence that Congress intended to distinguish superstations from other broadcast programming, or that superstations fail to meet consumer demand for broadcast programming. Rather, the words used by Congress to define "comparable" programming -- "at least some of which are television broadcasting signals"²⁵ -- omit any qualifying language that could be construed as a congressional intent to limit this provision to local broadcast programming.

The absence of such a congressionally specified distinction between local and satellite-delivered broadcasting signals is critical for two reasons. First, Congress has previously recognized -- and codified -- the proposition that superstations are television broadcasting stations.²⁶ In the absence of contrary congressional intent, the Commission must presume that in using the phrase "television broadcasting signals" with

²⁵ Conference Report at 170.

²⁶ See 17 U.S.C. § 119(d)(9) (defining "superstation" as a "television broadcast station"). This definition was subsequently incorporated into the Communications Act. See 47 U.S.C. § 325(b)(2).

respect to the comparable programming definition, Congress intended for this phrase to include superstations.²⁷

Second, in situations where Congress meant to accord dissimilar treatment to local television broadcast signals and satellite-delivered television broadcast signals, Congress has explicitly drawn this distinction in the statute itself.²⁸ Recognizing this, the Commission historically has only distinguished local and superstation broadcast programming pursuant to a specific congressional directive.²⁹ Since Congress

²⁷ See ICC Industries, Inc. v. United States, 812 F.2d 694, 700 (Fed. Cir. 1987) (there is a presumption that the same words used twice in the same act have the same meaning); See Marks v. United States, 161 U.S. 297, 302 (1896) (unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense).

²⁸ For example, in the must-carry provisions of the Communications Act, Congress specifically excluded "distant" signals from the definition of a "local commercial television station." 47 U.S.C. § 534 (h) (1) (B) (iii). Similarly, Section 325 of the Communications Act includes a separate subsection which specifically distinguishes superstations from other "broadcasting stations" for purposes of retransmission consent negotiations with cable operators. 47 U.S.C. § 325(b) (2) (D). In addition, Congress used specific language to except "a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station" from the requirement that all "television broadcast stations" be carried on the cable operator's basic service tier. 47 U.S.C. § 543(b) (7) (A) (iii).

²⁹ For example, the Commission's interpretation of the term "video programming" -- which Congress defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station" (47 U.S.C. § 522(20) (emphasis added)) -- has always included superstations. See (continued ...)

did not specifically distinguish between local and non-local television broadcasting signals in this statute, the Commission is precluded from doing so in its rules.

C. LECs or LEC Affiliates Providing Video Programming "By Any Means" Includes the Provision of Such Programming Via a SMATV System.

The Notice seeks comment on whether satellite master antenna television ("SMATV") systems provide "direct-to-home satellite service" ("DTH satellite service"), thereby causing SMATVs to fall outside the class of video providers that can be a source of effective competition under the new test.³⁰ As demonstrated below, under both the 1996 Act and Commission precedent, the

(... continued)

e.g., Cable Communications Policy Act Rules, 58 R.R.2d (P & F) 1, 16 n.33 (1985) (interpreting the statutory definition of programming comparable to television broadcast stations to include superstations). In fact, the lone instance where the Commission has treated superstations differently from other broadcast stations without an express congressional directive to do so is in its cable "benchmark" rate regulations, which specify that superstations should be treated as satellite, rather than broadcast programming. See FCC Form 393, Instructions For Worksheets Calculating Maximum Initial Permitted Rates for Regulated Services, Line 121, n. 3. However, this distinction is based solely on the added costs of carrying superstation programming, not on programming differences between local stations and superstations. See Rate Order, 8 F.C.C.R. 5631, at ¶ 210 (noting the need to distinguish satellite services for rate regulation purposes because of their effect on rates). Such a distinction is irrelevant to the question of "comparable programming" under the fourth effective competition test.

³⁰ See Notice at ¶ 71.

provision of video programming via SMATVs does not constitute DTH satellite service.

All statutory references to DTH satellite service define this term as the provision of service "by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscribers' premises or in the uplink process to the satellite."³¹ As the House Report further specifies, "DTH satellite services are delivered via satellite directly to consumers equipped with satellite receivers at their premises."³² Thus, an essential aspect of DTH satellite service is that there is a direct relationship between the satellite retail distributor and the consumer, with no commercial third-party middleman.

A SMATV system, by its very nature, is a commercial third-party middleman between the satellite distributor and the consumer. Moreover, SMATV subscribers do not receive their programming via an on-premises satellite receiver. Instead, SMATV systems consist of a common satellite receiver providing programming service for a large number of individual subscribers through a network of coaxial wires. Finally, unlike DTH

³¹ See 47 U.S.C. § 303(v); 1996 Act § 602(b)(1). See also 47 U.S.C. § 332(c)(7)(C)(iii).

³² House Report at 125.

satellite services which are national in nature,³³ SMATVs are a local service.³⁴ Thus, SMATVs are clearly outside the statutory definition of DTH satellite service.

Commission precedent confirms this conclusion. As the Commission has stated: "There are two different types of DTH [satellite] services: direct broadcast satellite ('DBS') services and home satellite dish ('HSD') services."³⁵ The Commission has consistently employed this definition of DTH satellite service³⁶ and has never included SMATV in the definition of DTH satellite service.³⁷

³³ See, e.g., House Report at 125 ("The Committee finds that DTH service is a national rather than local service. ... Unlike other video programming distribution systems, satellite-delivered programming services do not require the use of the public rights-of-way, or the physical facilities or services of a community").

³⁴ See, e.g., Program Access First Report and Order, 8 F.C.C.R. 3359, at ¶ 96 (1993) (cable, MMDS, and SMATV are local-oriented distributors which compete directly within a particular local market); Second Competition Report, 11 F.C.C.R. 2060, at ¶ 104 (1995) ("the operation of a SMATV system largely resembles that of a cable system -- one or more satellite dishes and antennas receive the programming signals; equipment combines, amplifies and processes the signals; and wires distribute the programming to individual dwelling units"); Third Rate Reconsideration Order, 9 F.C.C.R. 4316, at ¶ 10 ("We ... were not suggesting ... that SMATV service by itself might in some theoretical sense be capable of serving the entire nation").

³⁵ Second Competition Report, 11 F.C.C.R. 2060, at ¶ 48.

³⁶ See, e.g., Second Competition Report, Notice of Inquiry, 10 F.C.C.R. 7805, at ¶ 39 (1995); First Competition Report, 9 F.C.C.R. 7442, at ¶ 61 (1994); First Competition Report, Notice of Inquiry, 9 F.C.C.R. 2896, at ¶¶ 29-32 (1994). See also
(continued ...)

Since both the statutory and Commission definitions of DTH satellite service confirm that SMATV systems do not provide DTH satellite service, the provision of video programming by a LEC or a LEC affiliate via a SMATV in a cable operator's franchise area should trigger effective competition under the fourth test.

III. MDU ISSUES

A. Predatory Pricing Issues

1. TCI Supports the Use of Federal Antitrust Standards as Applied by Federal Courts in Reviewing Allegations of Predatory Pricing.

The 1996 Act amends Section 623(d) to exempt cable operators from the uniform rate structure provision with respect to pricing in MDUs as long as the prices charged are not "predatory."³⁸

"Predatory price discrimination" is an anticompetitive activity

(... continued)

Seltzer & Levy, "Broadcast Television In a Multichannel Marketplace," OPP Working Paper No. 26, at 114 (1991) (defining "direct-to-home satellite services" as C-Band (HSDs) and Ku-Band (DBS) services); In the Matter of Closed Captioning and Video Description of Video Programming, FCC 96-71 (released February 27, 1996), at ¶ 8.

³⁷ For example, in both of the Commission's competition reports, SMATV service has been treated as a separate and distinct category of service from "direct-to-home satellite" service. See First Competition Report, 9 F.C.C.R. 7442, at ¶ 91; Second Competition Report, 11 F.C.C.R. 2060, at ¶ 104.

³⁸ 47 U.S.C. § 543(d).

which has been previously defined by both Congress and the Supreme Court under the Robinson-Patman Act.³⁹ Given this well-established federal precedent, the use of the term "predatory" in Section 623(d) indicates Congress' intent to use these federal antitrust standards in the implementation of this provision.⁴⁰ Thus, TCI supports the Commission's determination in the Notice that "allegations of predation should be made and reviewed under principles of federal antitrust law as applied and interpreted by the federal courts."⁴¹

In addition to carrying out congressional intent, reliance on federal antitrust standards will provide a national framework that will afford greater certainty than disparate state or local standards. It is also in line with a well-established Commission practice. Throughout its regulation of pricing behavior, the

³⁹ See 15 U.S.C. § 13(a); Brooke Group, Ltd. v. Brown & Williamson Tobacco, 509 U.S. 209 (1993).

⁴⁰ Whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. Allen v. Grand Central Aircraft Co., 347 U.S. 535, 551 (1954). In the absence of any express repeal or amendment, the new provision is presumed in accord with the legislative policy embodied in those prior statutes. Id. Thus, they all should be construed together. Sanford v. Commissioner of the Internal Revenue, 308 U.S. 39, 44 (1939). See also Marks v. United States, 161 U.S. 297, 302 (1896) (unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense).

⁴¹ See Notice at ¶ 100.

Commission has consistently defined "predatory pricing" in accordance with federal standards.⁴²

2. The Commission Should Adopt a "Meeting Competition" Defense Under Section 623(d).

In accordance with principles of federal antitrust law, the Commission should expressly recognize a "meeting competition" defense to predatory price discrimination claims under 623(d).⁴³

⁴² See, e.g., Craig O. McCaw, 10 F.C.C.R. 11786, at ¶ 26 (1995) (adopting a definition of "predatory pricing" derived from federal case law interpreting the Robinson-Patman Act); Price Cap Performance Review for Local Exchange Carriers, 10 F.C.C.R. 7854, at n.40 (1995) (adopting the predatory pricing definition dictated by federal antitrust standards for the purpose of prohibiting LEC pricing discrimination); Amendment of Commission's Rules Concerning Maritime Communications, 10 F.C.C.R. 8419, at ¶ 22 and n. 57 (1995) (evaluating predatory pricing accusations in accordance with federal standards); Waiver of the International Settlements Policy for a Change in the Accounting Rate with the Dominican Republic, 10 F.C.C.R. 8264, at ¶ 15 (1995) (dismissing claims of predatory pricing because the complainant failed to establish predatory pricing, as defined by federal standards); Policy and Rules Concerning Rates for Dominant Carriers, 4 F.C.C.R. 2873, at ¶¶ 498-501 (1989) ("Dominant Carrier Order") (even though the federal statute did not specify that a "predatory" standard be used to analyze pricing behavior by LECs and AT&T, the Commission nonetheless determined that the guiding standard by which accusations of predatory pricing should be judged was federal "antitrust analysis and precedent" defining predatory behavior).

⁴³ The "meeting competition" test is an essential element of predatory price discrimination analysis under federal antitrust law. Indeed, in adopting the Robinson-Patman Act -- a statutory provision that expressly proscribes price discrimination -- Congress made "meeting competition" a statutory "safe harbor." See 15 U.S.C. § 13(a) & (b). See also U.S. v. National Dairy Products Corp. et al., 372 U.S. 29, 34 (1963). Prior to the Robinson-Patman Act amendments, the more general Clayton Act provisions against price discrimination also contained a "meeting
(continued ...)

The "meeting competition" defense allows a party accused of predatory price discrimination to "show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor."⁴⁴ Upon making such a demonstration, the accused seller has established an absolute defense to any accusation that its price differential was "predatory,"⁴⁵ and further examination of the competitive effects of the seller's pricing strategy is precluded.⁴⁶

(... continued)

competition" defense. See Federal Trade Commission v. Staley, 324 U.S. 746, 752 n.1 (1945). Accordingly, the Supreme Court has required that any analysis of predatory price discrimination under the federal antitrust laws must recognize the "meeting competition" defense. See F.T.C. v. Staley, 324 U.S. at 752-753; Malcolm v. Marathon Oil Company, 642 F.2d 845, 854 n.16 (5th Cir. 1981) (recognizing that the meeting competition defense applies regardless of whether the predatory behavior implicates the Sherman Act, Clayton Act, or the Robinson Patman Act); AAA Tire Finishing Equipment and Supplies, Inc. v. Tire Cosmetology, Inc., 583 F. Supp. 1530, 1532 (E.D. LA 1984) (same); Transamerica Computer v. IBM, 481 F. Supp. 965, 1002 (N.D. Cal. 1979) (recognizing the meeting competition test as a defense to Sherman Act violations).

⁴⁴ See 15 U.S.C. § 13(b); Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231 (1951).

⁴⁵ Standard Oil, 340 U.S. at 248 (reiterating that "meeting competition" is considered a complete defense to a charge of price discrimination).

⁴⁶ Id. at 250-251.

Adoption of the "meeting competition" defense as part of the MDU predatory pricing analysis is necessary if new Section 623(d) is to have its intended effect of encouraging competition and lowering prices for cable service to subscribers in MDUs.⁴⁷ As both the courts and Congress have recognized, the "meeting competition" defense is necessary to ensure that prohibitions against price discrimination foster, rather than hinder, competition.⁴⁸ Specifically, the Supreme Court has noted that the price discrimination prohibitions of the Robinson-Patman Act would be anticompetitive if a "meeting competition" defense were not allowed:

Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor There is nothing to show a congressional purpose, in such a situation, to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously

⁴⁷ See House Report at 109 (finding that "[c]urrent Commission regulations [which] require that if a cable operator offers a lower rate in one MDU it must offer the same low rate to MDUs across the franchise area ... does not serve consumers well by effectively prohibiting cable operators from offering lower prices in an MDU even where there is another distributor offering the same video programming in that MDU.") (emphasis in original).

⁴⁸ Brooke Group Ltd. v. Brown & Williamson Tobacco, 509 U.S. at 224 (concluding that the "meeting competition" test confirms that "Congress did not intend to outlaw price differences that result from or further the forces of competition").

raising its prices to its remaining customers to cover increased unit costs.⁴⁹

The Commission's ability to adopt a "meeting competition" defense under Section 623(d) is not limited by Time Warner Entertainment Company, L.P. v. FCC. In that case, the court upheld the Commission's refusal to provide for a "meeting competition" defense under the prior version of Section 623(d).⁵⁰ That decision was based on the fact that the former version of Section 623(d) prohibited all forms of price discrimination, unlike other provisions of the Act, such as Section 202(a), which prohibits only "unreasonable" price discrimination.⁵¹ Since the 1996 Act has now amended Section 623(d) to specify that only "predatory" price discrimination is prohibited, a "meeting competition" defense is fully consistent with prior Commission precedent and with the Time Warner v. FCC decision.

⁴⁹ Standard Oil Co. v. F.T.C., 340 U.S. at 249-250. See also id. at 248 & n.13 ("The heart of our national economic policy long has been faith in the value of competition;" the meeting competition defense fosters this ideal); Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 445 (1983) (recognizing the positive competitive effects of the "meeting competition" test); ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 433 (N.D. Cal. 1978) ("To force a company to maintain non-competitive prices would be to turn the antitrust laws on their head."), aff'd, 636 F.2d 1188 (9th Cir. 1980), cert. denied, 452 U.S. 972 (1981).

⁵⁰ Time Warner Entertainment, 56 F.3d at 191-192.

⁵¹ Id.